Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 1998

PETER CASTELLANO, et. al.,

Appellants,

-against-

THE CITY OF NEW YORK, et. al,

Appellees.

ON APPEAL FROM SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FIRST JUDICIAL DEPARTMENT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

I: HAVE THE APPELLANTS BEEN DEPRIVED OF DUE PROCESS OF LAW AND THE RIGHT TO PETITION FOR REDRESS OF GRIEVANCES UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE HOLDING OF THE NEW YORK COURTS THAT THEY ARE BOUND EITHER BY WAY OF RES JUDICATA, COLLATERAL ESTOPPEL OR WAIVER BY DECIDING THAT THEY WERE OR ARE IN PRIVITY WITH ACTIONS BROUGHT BY LITIGANTS OF GROUPS TO WHICH THEY DID NOT BELONG AND WHOSE CLAIMS WERE NOT THOSE OF THE APPELLANTS.

II: MAY POLICE EMPLOYEES OF A MUNICIPALITY BE DEPRIVED OF DEFERRED COMPENSATION FOR SERVICES ALREADY RENDERED BECAUSE THEY RETIRED ON DISABILITY OR UNDER A VESTED PENSION PROCEDURE.

III: DO RETIRED MEMBERS OF A POLICE PENSION PLAN HAVE STANDING TO CHALLENGE TRANSFERS OF MONEY FROM THE PENSION PLAN TO THE MUNICIPALITY IN THE FACE OF STATE CONSTITUTIONAL PROSCRIPTIONS AGAINST SUCH TRANSFER.

Full Caption.

SUPREME COURT OF THE UNITED STATES

PETER CASTELLANO, THOMAS G. BERGAMINE, VINCENT ABBRUZZESE, GEORGE ADELSON, ROBERT ALVINO, VINCENT AMBROSE, GERALD J. ANTHONY, MARTIN APPELBAUM, ANTHONY ARCABASCIO, JOHN AURICCHIO, JOSEPH BAGAROZZA, GARY BAKER, CHARLES J. BALSANO, THOMAS BANKS, HUBERT BARKER, PETER R. BARKIIAUSEN, JOHN J. BARRY, FRANK BASILE, VINCENT A BATTIATO, JEFFREY BAYNON, EDGAR J. BEATTY, FRITZ D. BERK, ROBERT BLEUZE, FRANK BOLZ, PATSY BONANNO, JOSEPH K. BORG, HAROLD BOYLAN, WILLIAM F. BOYLAN, JOSEPH a. BOZELLI, ROBERT BRACCO, RALPH E. BRECH, JAMES R. BRINSON, LAWRENCE BRODSKYT, TERENCE J. BROUGHAL, FRANCIS W. BRUEN, MICHAEL J. BRUNO, JOSEPH BUCETI, RUDOLF BUCHOLZ, ROSARIO BUONE, GARY BUONTENTO, KIERNAN J. BURKE, JOSEPH F. BUTLER, WILIAM J. BYRNE, RALPH A. CABO, ALFRED CAFFERATA, THOMAS E. CAHILL, VINCENT J. CALANDRA, CHARLES CALANDRA, ROBERT CALI, PATRICK R. CAMBRIDGE, VINCENT F. CAMPBELL, EDWARD J. CANEPA, FRED CAPOBLANCO, RICHARD T. CARBERRY, STEVEN CARCATERRA, JAMES G. CAROLAN RICHARD J. CARROLL, THOMAS A. CARROLL, ROBERT A. CASABURI, JOHN J. CASELS, PETER CASSI, JAMES F. CASSIDY, MICHAEL CASSIDY, JOHN CASTRELLO, FRANK CATALANO, PHILIP CERBINI, GEORGE J. CERRONE, IGNATIUS

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Appellants,

-against-

THE CITY OF NEW YORK, THE BOARD OF TRUSTEES OF THE POLICE OFFICER'S VARIABLE SUPPLEMENTS FUND, BOARD OF DIRECTORS OF THE POLICE SUPERIOR OFFICERS VARIABLE SUPPLEMENTS FUND,

Appellees.

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PARTIES.

The Parties are those set forth in the caption at p. ii.

OPINIONS BELOW.

The Supreme Court of the State of New York, County of New York (Diamond, J.) dismissed the complaint by Order dated 12th day of November, 1996. (Supreme Court State of New York, County of New York, Index No. 92/9200, n.o.r.); (A22) the Dismissal of the Complaint was affirmed by the New York Supreme Court, Appellate Division, First Department on the 23d day of June, 1998,___ AD2d ___ ___NYS2d ___(1998) (A20); an appeal on jurisdictional grounds was dismissed by the New York Court of Appeals sua sponte on the 17th day of September, 1998 ___NY2d____(1998) (A9); and a motion for leave to appeal was denied by the New York Court of Appeals on the 22d day of December, 1998, ____ NY2d ___ (1998). (A8)

STATEMENT OF JURISDICTION.

The Supreme Court of the State of New York, Appellate Division, First Judicial Department is the court possessed of the record, in that it is its affirmance of the dismissal of the complaint by the trial court that is the last opinion which is the subject of this appeal.(A20) The New York Court of Appeals did not render a substantive decision but dismissed the appellants' jurisdictional statement on September 17, 1998 (A9) and denied a motion for leave to appeal on December 22, 1998. (A8) This jurisdictional statement is filed on appeal from Order of the Appellate Division, First Department of the Supreme Court of the State of New York,

dated the 23d day of June, 1998 which affirmed the judgment and order of the Supreme Court State of New York, County of New York dated the 30th day of December, 1996, dismissing the complaint on the opinion and order of Supreme Court New York County, dated November 12, 1996. (A22) In addition to service of this jurisdictional statement upon the Corporation Counsel of the City of New York, the attorney for the all of the defendants, service is also being made upon the Attorney General of the State of New York because it is alleged that statutory provisions of New York law violate the New York Constitution and the United States Constitution. This jurisdictional statement is being filed within 90 days of the Order of the New York Court of Appeals denying leave to appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Set forth in the Appendix page A27a, United States Constitution, First and Fourteenth Amendments, New York State Constitution, Art. V. Sec. 7 New York Executive Law, Section 650, New York Laws, Chapter 247, Laws of 1988

STATEMENT OF THE CASE

The Appellants are retired members of the New York City Police Department and members of the New York City Police Pension Fund ("PPF") who retired either on disability retirement after more than 20 years service or under 20 years service, or retired under a vested 15 year retirement program.

In 1968 by reason of collective bargaining agreements a benefit was established for members of the PPF which provided for payment of a variable supplement to retired members. The Variable Supplement Fund consisted of excess investment earnings of the PPF beyond that needed to pay the underlying pensions, and did not contemplate the expenditure of public money.

The Appellants are not receiving the Variable Supplement Fund ("VSF")benefit despite the fact that they are all members of the Police Pension Fund. Under the collective bargaining agreement which set up the VSF benefit, there was no exclusion of any member of the Police Pension fund from entitlement to the VSF benefit.

In 1988 the variable nature of the benefit became a defined benefit payment under a collective bargaining agreement and its enabling legislation, Chapter 247 of the Laws of 1988. Also there was a provision for transfers of money in excess of 75 million dollars of Police Pension Fund assets to the City of New York.

The plaintiffs contended that there was no exclusion of any member of the PPF from the payment of the benefit and that they are being deprived of it illegally based upon the fact that they retired either on disability pension or under the vested pension plan. They also contend that the initial and subsequent or sequential transfer of earnings of the PPF of which they are members violated Art. V, Sec. 7 of The New York State Constitution. (A28)

The New York Court of Appeals, during the course of the litigation, defined the VSF benefit as deferred compensation for services rendered while on the job and not a pension benefit. *Gagliardo v Dinkins*, 89 NY2d 62 (1996). Also heard and decided at the same time was the case of *Ballentine v Koch*, 89 NY2d 51 (1996) which held that transfer of pension fund money from the PPF to the City of New York violated the New York Constitution, but as to the *Ballentine* litigants, all of whom were retired officers receiving the VSF benefit, the Police Benevolent Association Union had waived it.

Appellants contended that there was no authority to deprive them of pay earned for services performed and that the method of retirement is irrelevant to the entitlement thereto. They further contended that there should be a refund

to the PPF of the money transferred to the City of New York.

The Supreme Court, State of New York, County of New York (Diamond, J.) dismissed the complaint. (A22) The Appellate Division of New York Supreme Court affirmed the dismissal of the complaint by its order dated June 23, 1998. In doing so it held that the Appellants here were subject to issue preclusion either by way of *res judicata* collateral *estoppel* or waiver, on the grounds that their assertions were litigated by parties in privity with them in *Gagliardo v Dinkins*, 89 NY2d 62 (1996) and in *Ballentine v Koch*, 89 NY2d 51 (1996) (A20)

The Appellate Division did not address the substantive arguments of the Appellants here. That decision was the first indication that *res judicata*, collateral estoppel, waiver or privity of representation was identified. In doing so it held that the Appellants were in privity with litigation mounted by members of the New York City Housing Authority Police and New York City Transit Authority Police in the case of *Gagliardo*, and in privity with the litigants in the case of *Ballentine*, which litigants were retired members of the New York City Police Pension Fund who, unlike the Appellants, were receiving the Variable Supplement Fund benefit. (A20-21)

In an attempt to appeal to the New York Court of Appeals both in the jurisdictional statement and motion seeking leave to appeal to the New York Court of Appeals, the issue raised herein, denial of due process of law and deprivation of the right to petition for redress of grievances was raised by the Appellants in response to the issue preclusion.(A15, point IV).

The Appellants sought leave to appeal to the New York Court of Appeals on constitutional grounds to wit: (1) The *Ballentine* court specifically limited the waiver of the constitutional proscription against transfer of pension fund assets to the municipality to the litigants in *Ballentine* and

therefore there was no privity or collateral estoppel or waiver;(2) that there was no privity with the *Gagliardo* litigants because in that case the litigants were Transit Authority and Housing Authority Police who belonged to a different pension plan, and that the *Ballentine* decision was limited by the court to the litigants there; (3) that the transfer of money from the NYC Police Pension Fund to the municipality was unconstitutional under Art. V, Sec. 7 of the New York Constitution and (4) There is no authority to deprive an employee of deferred compensation for services already rendered because of the method in which that employee retired, all of which deprived the Appellants of their constitutional rights to due process of law and the right to petition for redress of grievances under the United States Constitution. (A12-14)

This jurisdictional statement is being served within 90 days of the order of the New York Court of Appeals denying leave to appeal to it.

ARGUMENT

Point I: The Appellants were deprived of the right to petition for redress of grievances under and to due process of law in violation of the First and Fourteenth Amendments to the United States Constitution when the New York Supreme Court, Appellate Division affirmed dismissal of the complaint by imposing preclusive concepts of *res* judicata, collateral estoppel, waiver and privity upon the Appellants' claims, when no privity or waiver existed.

The constitutional issue as to whether the appellants were deprived of the right to petition for redress of grievances and the right to equal protection of the laws by reason of the imposition of issue preclusion against the appellants was raised in the New York Court of Appeals in the Appellants' jurisdictional statement (Point IV at Al5) Such was the first opportunity to raise issue preclusion concerns since it was first raised in the Appellate Division affirmance of the dismissal of the complaint by the trial court.

Issue preclusion doctrines of *res judicata*, collateral estoppel, waiver or privity reflect the refusal of law to relitigate issues which were previously raised or had been failed to be raised in a litigation which reached conclusion. There must be a person or entity as litigant, or one who is in privity with a litigant.

Res judicata, collateral estoppel and waiver can be imposed only if issues, that were or could have been dealt with in an earlier litigation are raised anew between the same parties. See: *Angel v. Bullington*, 330 U.S. 183, 192-193 (1947).

This Court granted review of the issue of res judicata and preclusive effect in the case of *St. John v. Wisconsin Board*,

340 U.S. 411, 414 (1951) in which it was held that the District Court's interpretation of the state law as to res judicata in that case was erroneous. In that case, as in this, the lower court did not reach the substantive issues, but relied on principles of res judicata, holding that a prior state court judgment to which appellants were party conclusively barred them from raising any issues pertaining to the constitutionality of the Wisconsin Act.

Here, instead of determining the issues raised by the appellants in the Appellate Division, that court merely affirmed on the ground that the Appellants were in privity with the *Gagliardo* and *Ballentine* litigants and hence the Appellants were estopped either because of *res judicata*, collateral estoppel, privity or waiver concepts from pursuing the issues raised in those cases.

In the New York Court of Appeals, the appellants asserted that the *Gagliardo* litigants, disabled retirees of the New York City Housing Authority and New York City Transit Authority Police Departments were members of the New York City Employees Retirement System and not the New York City Police Pension Fund and that the attorneys and litigants in *Gagliardo* did not represent the appellants in any way.

The New York Court of Appeals in *Gagliardo* had held that the transfer of pension fund moneys from the New York City Employee Retirement System covering Transit and Housing Police to the City of New York raised grave constitutional concerns, but as the *Gagliardo* plaintiffs did not raise the issue, that court was not called upon to address the issue. Here the Appellants did raise the issue in the Supreme Court, and the New York Court of Appeals was called upon to address the issue. (Point I at A14)

The Appellate Division decision also held that the appellants were precluded either under *res judicata*, collateral estoppel or purported waiver by reason of the

decision in the case of *Ballentine v Koch*, 89 NY2d 51 (1996). In seeking leave to appeal to the New York Court of Appeals, the appellants here asserted that the *Ballentine* litigants were New York City Police Department retirees who were receiving the Variable Supplement defined benefit, and that the decision in *Ballentine* was not binding on these appellants.

The basis for the Appellants' position in its motion for leave to appeal to the New York Court of Appeals as well as here was and is that the New York Court of Appeals in *Ballentine* specifically held that the transfer of NYC Police Pension Fund money to the City of New York was unconstitutional, and that the union waived the New York Constitutional proscription against transfer to a municipality of pension fund assets contained in New York Constitution, Art. V, Sec. 7. The *Ballentine* decision specifically held that such transfer of pension fund money was unconstitutional, but as to the *Ballentine* litigants, the union had waived the constitutional impediment. The *Ballentine* litigants were retired members of the New York City Police Pension Fund who did not retire on disability or vested pension and were receiving the VSF benefit.

The Appellants, in their New York Court of Appeals jurisdictional statement supported their contention that the decision in *Ballentine* did not bind the Appellants here because the union's waiver of the constitutional proscription against transfer of pension fund assets to the municipality was binding as to the *Ballentine* litigants.

Further, they cited the case of *Bergamine v Police Benevolent Assn.*, 292 AD2d 291 (lst Dept 1994) leave to appeal denied 83 NY2d 758 (1994), which specifically held that the PBA did not represent retired members of the New York City Police Department. Many of the Appellants here were litigants in *Bergamine*.

In *Ballentine*, the New York Court of Appeals specifically

held that transfer of money from the NYC Police Department Police Pension Fund was unconstitutional and that the union *as to the litigants therein* had waived the constitutional proscription.

What makes this particularly egregious is the fact that the Appellants herein were specifically held not to be represented by the Police union in the case of *Bergamine v Police Benevolent Assn.*, 292 AD2d 291 (lst Dept 1994) leave to appeal denied 83 NY2d 758 (1994), which specifically held that the Police Benevolent Assn. did not represent the Appellants who were retirees at the time the 1988 waiver declared by the court as unconstitutional was engaged in by the Police Benevolent Assn. Union and the City of New York.

It is suggested that the case at bar is even stronger than *St. John* in that here the appellants were not parties in or privity to either the *Ballentine* or the *Gagliardo* litigations upon which the court below imposed issue preclusion on these Appellants.

In *Lawlor V. National Screen Service*, 349 U.S. 322 (1955)this court held that with respect to the litigants who were not parties to the alleged preclusive suit whose relationship to the other litigants therein was not close enough to bring them within the scope of the doctrine of res judicata, the preclusive effect of the subject litigation did not attach. It was further observed that the basic distinction between the doctrines of res judicata and collateral estoppel is that under the doctrine of res judicata, a judgment "on the merits" in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit. In a res judicata situation the issue is whether

the plaintiffs in the present suit are suing upon the `same cause of action' as that upon which they sued in a prior suit and lost. This Court went on to observe that a prior judgment is res judicata only as to suits involving the same cause of action. Moreover this court held that there is no merit in the contention that litigants are precluded by their failure in the a prior suit to press their demand for relief sought in the litigation under review.

It should be further observed that the issue preclusion elements of control of an action and those whose interests are represented by a party to the action, or successors in interest to parties to a litigation are not present here.

Absent the status of parties in the *Ballentine* and *Gagliardo* litigations, res judicata does not apply. Absent the representation of an interest of these appellants by the litigants in the *Ballentine* and *Gagliardo* litigations, or control of litigation or successor in interest status of the Appellants the doctrine of collateral estoppel does not apply. The holding that there was issue preclusion by reason of those prior litigations did deprive the Appellants here of their right to Petition for Redress of Grievances under the First and Fourteenth Amendments to the United States Constitution

Moreover the Appellate Division whose order is the subject of this jurisdictional statement not only worked improper issue preclusion on the Appellants, but erroneously believed that the lawsuit somehow related to a waiver in 1970, the time the VSF benefit was created. In fact it did not. The waiver discussed in *Ballentine* and in this case dealt with the fact that the PBA union had waived the constitutional proscription against transfer of pension fund money to the City of New York which was brought about in the negotiations leading to the change of the VSF benefit to a defined benefit in 1988. To verify that the Appellate Division was placing great importance to the year 1970 when

the VSF was created, and not 1988 the relevant date respecting the change of the nature of the VSF to a defined benefit, the court in a footnote at A21 notes that all the plaintiffs retired after 1970. The 1988 waiver is the one decried by the New York Court of Appeals in both *Ballentine* and *Gagliardo* as unconstitutional.

Although the Appellate Division was quick to impose issue preclusion on the Appellants on the erroneous basis of res judicata, collateral estoppel, or waiver, it did not impose issue preclusion by way of collateral estoppel against the City of New York which was a party to the *Ballentine* litigation wherein it was specifically determined that the transfer of money from the Police Pension Fund to the City of New York was in violation of the New York Constitution. Nor did it follow the ruling there that the waiver by the union was limited to the *Ballentine* litigants.

Further, the City of New York was a party in *Bergamine* and hence the ruling there that the PBA did not represent the retired disabled and vested members of the Police Pension fund is preclusive on the City of New York as well.

Further, the City of New York was also a party as were most of the Appellants herein in the case of *Castellano v Bd of Trustees*, 93 7 F. 2d 752 [2d Cir. 1991] cert. denied 112 S.Ct. 378 [1991] (Hereinafter "*Castellano I*")where it was determined that there was no exclusion of any retired member of the Police Pension Fund to the Variable Supplement benefit was provided for in the collective bargaining agreement and that if there were any exclusion it must have been made by the legislature. The 2d Circuit there also deferred to the New York Court of Appeals to define the nature of the Variable Supplement Fund benefit.

It was not until *Gagliardo* decided during the course of this litigation, that the New York Court of Appeals defined the VSF benefit as deferred compensation for services rendered by the member while on the job. If anyone should

be precluded it is the City of New York which, as things now stand, is depriving these Appellants of pay for services they rendered while on the job, a condition not unlike that of involuntary servitude.

The VSF benefit is deferred compensation for services rendered by the member while on the job and is not a pension benefit. The method of retirement has no rational relevance to the entitlement of these Appellants to be paid the compensation for the work they performed before they retired.

Yet all of these substantive issues were foreclosed to the Appellants by reason of the issue preclusion erroneously imposed by the Appellate Division.

Absent the status of parties in the *Ballentine* and *Gaglardi* litigations, res judicata does not apply. Absent the representation of an interest of these appellants by the litigants in the *Ballentine* and *Gagliardo* litigations, or control of litigation or successor in interest status of the Appellants the doctrine of collateral estoppel does not apply.

The determination to affirm the dismissal of the complaint on issue preclusion grounds deprived the Appellants of due process of law and of the right to Petition for Redress of Grievances under the First and Fourteenth Amendments to the *United States Constitution.*

This court should note probable jurisdiction in this case and decide the important question it presents of the res judicata, collateral estoppel, waiver and privity and whether the improvident imposition of such issue preclusion works an unconstitutional deprivation of the right to petition for redress of grievances and the right to due process of law under the *United States Constitution* First and Fourteenth Amendments. This presents an issue of high constitutional importance justifying noting probable jurisdiction, or in the alternative granting certiorari.

Point II: The dismissal of the complaint and the affirmance thereof by the imposition of issue preclusion deprived the Appellant members of the New York City Police Pension Fund of their right to Petition for Redress of Grievances and of Due Process of Law, in the face of judicial determination that the transfer of money from the Police Pension Fund to the City of New York was in violation of the New York State Constitution.

The Appellants raised the issue of the constitutionality of transferring pension fund money to the City of New York in their complaint. (A30)

The City of New York takes credit against NYC Police Pension Fund excess earnings by lowering employer contributions which is doing indirectly what it cannot do directly. This was the situation which caused the *Ballentine* and *Gagliardo* court to declare such arrangement unconstitutional and a matter of grave concern. Yet the Appellants, as members of the Police Pension Fund, who are owners of and whose assets generated the excess earnings beyond that with which to fund the defined benefit, have been deprived of the opportunity to recoup the unlawful transfer of funds for the Police Pension Fund of which they are members.

Pension money transferred to the City of New York from the NYC Police Pension Fund earnings is a violation of Art. V, Sec. 7 of the New York Constitution, as was held in both *Gagliardo* and *Ballentine* during the course of this litigation. The assertion was raised in the trial court as was the request for declaratory judgment seeking refund of moneys transferred to the City of New York from the NYC Police Pension Fund under the terms of Ch. 247 of the Laws of 1988 and seeking specifically to declare the section unconstitutional. (A24-26)

In *Gagliardo v Dinkins*, 89 NY2d 62 (1996) and

Ballentine v Koch, 89 NY2d 51 (1996)both argued the same day, the New York Court of Appeals held that the transfer of pension fund money to the city of New York in exchange for changing a variable supplement benefit into a defined benefit was unconstitutional and raised grave concerns.

Ballentine specifically held that the transfer of pension fund earnings to the City of New York is a violation of Art. V, Sec. 7 of the New York Constitution, and the waiver thereof is binding upon the litigants there, who, unlike the Appellants here were receiving the variable supplement benefit as retired members of the Police Pension Fund.

In *Gagliardo* relating to litigants who were members of the New York City Housing Authority and New York City Transit Authority Police Departments and who were not members of the New York City Police Pension Fund, the unanimous court stated:

> ..... Were there a statutory arrangement involving a simultaneous or sequential transfer of pension fund assets to a VSF and then a transfer of a portion thereof to the City of New York in exchange for some guarantee of VSF benefits, far graver questions would be presented, concerning the integrity of the pension fund assets and whether such statutory scheme would work an effective reduction in employer contributions. Such a legislative arrangement would invoke serious concerns that it represented an attempt to achieve indirectly that which we have previously held in McDermott v Regan (supra) to be invalid when sought to be accomplished directly. We are not, however, called upon to address such concerns in this case....

Here the courts below were called upon to address the

concerns identified by the New York Court of Appeals in those two decisions, but this constitutional issue was not addressed by reason of the Appellate Division's erroneous imposition of issue preclusion on the Appellants. This had a direct effect of denying the Appellants, all of whom are members of the New York City Police Pension Fund, of their right to Petition for Redress of Grievances and their right to Due Process of Law under the First and Fourteenth Amendments to the United States Constitution, concerning the Appellants' grievance which the New York Court of Appeals in *Ballentine* specifically ruled that the practice complained of here was unconstitutional.

In *Ballentine*, the appellants here were not parties nor were they bound by the result therein either by way of res judicata or collateral estoppel. The New York Court of Appeals specifically held that transfer of money from the NYC Police Department Police Pension Fund was unconstitutional (a contention contained in the Appellants' complaint in this litigation) and that the union *as to the litigants therein* had waived the constitutional proscription.

The *Ballentine* litigants were retired members of the New York City Police Department who, unlike the appellants herein, were receiving the Variable Supplement Fund benefit and had objected to it being turned into a defined. What makes this particularly egregious is the fact that the Appellants herein were specifically held not to be represented by the Police union in the case of *Bergamine v Police Benevolent Assn.*, 292 AD2d 291 (lst Dept 1994) leave to appeal denied 83 NY2d 758 (1994), which specifically held that the Police Benevolent Assn. did not represent the Appellants who were retirees at the time the 1988 waiver declared by the court as unconstitutional was engaged in by the Police Benevolent Assn. Union and the City of New York.

This state of affairs demonstrates that the Appellate

Division whose order is the subject of this jurisdictional statement not only worked improper issue preclusion on the Appellants, but erroneously believed that the lawsuit somehow related to a waiver in 1977. The only waiver that this litigation concerns is the 1988 waiver which in both *Ballentine* and *Gagliardo* was declared unconstitutional.

Since there is impressive authority that the transfer of pension fund money to the municipality is unconstitutional, the appellants should not have been blocked from litigating this matter by the action of the appellate division in imposing issue preclusion improvidently.

Point III The variable supplement has been defined by the New York Court of Appeals as deferred compensation for services performed by the member of the New York City Police Department before retirement and that the benefit is not a pension benefit. No retired member of the NYC Police Pension Fund was excluded under the collective bargaining agreement establishing it, and the method of retirement has no rational relevance to the entitlement thereto.

Since the New York Court of Appeals in *Gagliardo* specifically defined the Variable Supplement Benefit as deferred compensation for services rendered by the officer before retirement and that it is not a pension benefit, this Court should note probable jurisdiction to give the Appellants the opportunity to litigate this deprivation of compensation for work they performed on the job.

Gagliardo was decided during the course of this litigation and the issue was raised in the briefing in the appellate division

The City of New York takes the view that although there was not exclusion of any retired member of the Police Pension Fund from the benefit in the collective bargaining agreement as held in *Castellano I*, the legislature must made the exclusion. No legislative enactment specifically excluding any retired member of the Police Pension Fund has been passed. Moreover, even were the Legislature to work such exclusion not contained in the collective bargaining agreement, the legislature had no authority to exclude any member of the NYC Police pension fund from the Variable Supplement Fund [VSF] benefit. This is consistent with the holding that the VSF is not a pension benefit, but deferred payment for services rendered while on the job.

In *Castellano I*, the City contended that there was an

exclusion in the collective bargaining agreement of certain retired members of the Police Pension Fund. The 2d Circuit held that there was no exclusion in the collective bargaining agreement and any exclusion must have been made by the legislature. The court also deferred to the New York Court of Appeals to define the nature of the Variable Supplement Fund benefit. Having lost the issue of exclusion by the contract, the City then took the position that the Legislature made the exclusion. The constitutional issue is whether the New York Legislature had authority to vary the terms of the collective bargaining agreement under the separation of powers provisions of the New York Constitution. *N.Y. Civil Service Law* Sec. 204 makes negotiation of contracts with employees of the state or political subdivision an executive branch function and that *Executive* Sec. 650 specifically verifies that contract negotiations are executive branch functions. Separation of powers would preclude the legislature from engaging in this executive branch function.

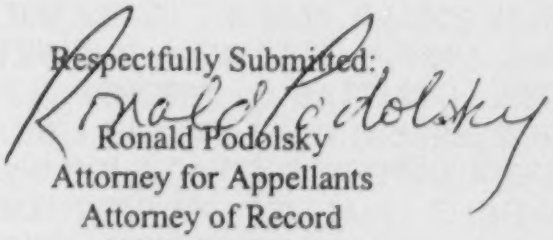
Moreover, it is an issue of extreme constitutional moment to permit the Appellants to go forth in this litigation in order to have the courts determine by what constitutional, statutory, logical, or other measure anyone, including members of the legislature, executive branch or the judicial branch of government can legally deprive a person of compensation for services already performed.

CONCLUSION:

By reason of the matters herein contained probable jurisdiction should be noted, or should it not be noted, certiorari should be granted.

Dated: Hauppauge, N.Y.
March 10, 1999.

Respectfully Submitted:



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HARRINGTON, GEORGE KAY, ANDREW DLEMON, ANTHONY LABADIE, HUCH MCCABLE, DANIEL J. O'CONNELL, JOHN POSA, BENNIE PULICE, EDWARD SCHNELL, THOMAS SEPE, DOROTHY C. WOLKE, AND ROBERT J. HAMM,

Plaintiffs,

-against-

THE CITY OF NEW YORK, THE BOARD OF TRUSTEES OF THE POLICE OFFICER'S VARIABLE SUPPLEMENTS FUND, BOARD OF DIRECTORS OF THE POLICE SUPERIOR OFFICERS VARIABLE SUPPLEMENTS FUND,

Defendants.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City Albany on the twenty-second *day of* December 1998.

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding*

1-10 Mo.No. 1270

PETER CASTELLANO, ET AL,
Appellants,

v.

THE CITY OF NEW YORK, ET AL.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

S/
Stuart M Cohen
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City Albany on the seventeenth *day of* September 1998.

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding*

Mo. No. 1160 SSD 58

PETER CASTELLANO, ET AL,
Appellants,

v.

THE CITY OF NEW YORK, ET AL.,
Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

S/
Stuart M. Cohen
Clerk of the Court

COURT OF APPEALS
STATE OF NEW YORK

PETER CASTELLANO, et al.,
Plaintiff-Appellants,

-against-

THE CITY OF NEW YORK, et al.,
Defendant-Respondents.

Plaintiff-Appellants Jurisdictional Statement Rule 500.2 (Supreme Court N.Y. County Index 9200/92)

(FULL CAPTION ANNEXED)

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1. The title of this case is as set forth in annexed caption.

2. Plaintiff-Appellants appeal to the Court of Appeals from the Order of the Appellate Division, first Judicial Department entered on or about the 23rd day of June, 1998, which order affirmed the Order and Judgment of Supreme Court, County of New York (Diamond, J.) dated November 12, 1996 and entered in the Office of the County Clerk of New York County and Clerk of the Supreme Court , New York County on the 30th day of December, 1996, granting Defendants cross-motion for summary Judgment dismissing the Complaint and denying plaintiffs' motion for summary judgment.

3. Copies of Plaintiffs' Notice of Appeal served by mail on the 17th day of July, 1998 and the original was filed in the New York County Clerk's office on the 17th day of July, 1998. The copies were served by mail upon the following attorney as follows:

Michael C. Hess

Corporation Counsel of the City of New York
Attorney for Defendants
100 Church Street
New York, New York 10007

Solicitor General
Department of Law
The Capitol
Albany, N.Y. 12224

4. The Order of the Appellate Division, First Judicial Department, entered the 23rd day of June, 1998 was served with a notice of entry upon Ronald Podolsky, Esq., attorney for the Plaintiff-Appellants on the 13th day of June, 1998 by mail.

5. The name and address of the attorney for the defendant-respondents is: Michael D. Hess, Corporation Counsel of the City of New York, 100 Church Street, New York, N.Y. 10007. Also served was the Solicitor General Department of Law, The Capitol, Albany, N.Y. 12224. Annexed hereto are Plaintiffs-Appellants' Notice of Appeal dated the 17th day of July, 1998 (Ex. A); the Order of the Appellate Division, First Judicial Department appealed from dated the 23rd day of June, 1998 with notice of entry (Ex. B); and the Decision and Order of the Supreme Court, New York County, (Diamond, J.) dated the 12th day of November, 1996 which dismissed the complaint and granted defendant's cross-motion for summary judgment. (Ex. C).

BASIS OF COURT OF APPEALS JURISDICTION

6. The Court of Appeals has jurisdiction to entertain this appeal as of right pursuant to CPLR 5601(b)(2). The Order of the Appellate Division First Department sought to be appealed from is an Order.

a. Which finally determined this action by affirming the Judgment and Order of the Supreme Court, New

York County which granted Defendants' motion for summary judgment dismissing the Plaintiffs' complaint, and

b. which Order and Judgment involved United States Constitutional and New York State Constitutional issues of:

(1) whether Ch. 247, Laws, 1988 which provided for the transfer of earnings from the NYC Police Pension Fund to the City of New York, and whether subsequent direct or indirect transfers of earnings of the NYC Police Pension fund violate Art V, Sec. 7 of the New York Constitution. This court noted jurisdiction in the case of *Ballentine et al v. Koch*, 89 NY2d 51 (1996) wherein this court determined that the transfer was violation of Art. V. Sec. 6 of the New York Constitution but as to the Ballentine plaintiffs, the union had waived the constitutional prescription against the transfer of pension fund assets to the City of New York. Also this court noted constitutional jurisdiction in the case of *Gagliardo v. Dinkins*, 89 NY2 d62 (1996) wherein this court held that it would be unconstitutional for sequential transfers of money to take that place from a pension fund to the City of New York, but that issue was not before the court at that time. This case concerns such sequential transfers.

(2) Whether the collective bargaining contract between the City of New York and its police unions excluded any retired member thereof from the payment of the Variable Supplement Fund benefit provided for in the enabling legislation Chapter 876 of the Laws of 1970 and whether the Legislature had the intent or power under Art II, Sec. 1 of the New York Constitution vesting legislative power in the legislature under separation of powers concepts and Executive power under Art. IV in the Executive branch of government, and *Executive Law* Sec. 650 making labor negotiations between the executive branch and its employees an executive branch function, and whether if in fact Ch. 876 of the Laws of 1970 did exclude any retired member of the NYC Police Pension

Fund from the payment of the Variable Supplement benefit, defined by the New York Court of Appeals as deferred compensation for services the member provided while on the job, either individually or collectively render any real or imagined exclusion contained in Ch. 876 of the Laws of 1970 unconstitutional.

(3) whether not paying deferred compensation for services rendered by depriving the payment of the VSF benefit payment to the plaintiffs-appellants who are retired members of the New York City Police Department Police Pension Fund who retired either on disability or under a vested pension provision, who contributed to the Police Pension Fund as members thereof, and which VSF benefit is funded by excess earnings of Police Pension Fund investments and does not contemplate the expenditure of public funds violates the Equal Protection of the Laws component of the United States Constitution, 14th Amendment and the New York Constitution and equal pay for equal work provisions of Federal and State law and

(4) whether as deferred compensation rather than a pension benefit, there is federal or state income tax or social security tax due or whether federal pension laws are violated.

(5) Whether litigants who are in a different union and belong to a different pension plan than the appellants here are "in privity" with them to the extent of imposing either res judicata or collateral estoppel upon the appellants as was done by the Appellate Division. It is contended that such imposition is without due process of law. To determine that the Petitioners are bound by res judicata or collateral estoppel is an error of constitutional magnitude as the petitioners were neither parties in those actions nor in privity with the plaintiffs int hose actions, With respect to the Police Union waiver of the constitution, expressed in *Ballentine v. Kock* , 89 NY2d 51 (1996), such waiver by the union is not binding on the Petitioners because (1) the Ballentine court determined that the

waiver of the constitution was binding as to the Ballentine Plaintiffs, and (2) it was made abundantly clear in *Bergamine v. PBS*, 202 AD2d 201 (1st Dept. 1994) *leave to appeal denied* 83 NY2d 758 (1994) v. PBA that the union did not represent retired disabled NYCPD police officers and owed them no fiduciary duty.

Because the Supreme Court and the Appellate Division decision disposed of the Appellants' claims by dismissing the complaint on summary judgment, and affirmance, those courts did not appropriately address the constitutional issues involved.

POINT HEADINGS.

I

THE SUPREME COURT AND THE APPELLATE DIVISION HAVE FAILED TO CONSIDER THE UNCONTROVERTED EVIDENCE OR ORIGINAL INTENT AND SUBSEQUENT IMPLIMENTATION OF THE VARIABLE SUPPLEMENT BENEFIT; AND BY REASON WHEREOF HAVE PERMITTED UNAUTHORIZED EXCLUSIONS, HAVE TREATED THE VSF BENEFIT AS A PENSION BENEFIT AND HAVE PERMITTED THE UNCONSTITUTIONAL WAIVER OF ART. V., SEC. 7 BY THE UNION IDENTIFIED IN THE BALLENTINE CASE TO IMPACT ON THE PLAINTIFFS-APPELLANTS WHO WERE NOT BOUND THEREBY, AND WHO HAVE STANDING AS MEMBERS OF THE NYC POLICE PENSION FUND TO SEEK RECOUPMENT BY THE POLICE PENSION FUND OF ALL DIRECT AND INDIRECT PAYMENTS BY THE FUND TO THE CITY OF NEW YORK INCLUDING BUT NOT LIMITED TO THE AMOUNT THE CITY TAKES CREDIT FOR AGAINST ITS CONTRIBUTION TO THE POLICE PENSION FUND FOR EXCESS EARNINGS OF THE FUND NOT USED FOR THE VSF PAYMENT AND FOR SUCH CREDIT THE CITY MAY TAKE FOR ADMINISTRATIVE COSTS PAID BY

THE PENSION FUND TO THE CITY.

II

THE VARIABLE SUPPLEMENT BENEFIT IS NOT A PENSION BENEFIT AND HAS NO RATIONAL RELATIONSHIP TO THE MANNER OF RETIREMENT; IT IS DEFERRED COMPENSATION FOR SERVICES RENDERED AND THE LEGISLATURE HAD NO INTENT OR AUTHORITY TO EXCLUDE ANY MEMBER OF THE NYC POLICE PENSION FUND FROM THE VSF BENEFIT WHEN NO EXCLUSION OF ANY MEMBER OF THE NYC POLICE PENSION FUND FROM THE VSF BENEFIT WHEN NO EXCLUSION OF ANY MEMBER OF THE POLICE PENSION FUND WAS PROVIDED FOR IN THE COLLECTIVE BARGAINING AGREEMENT AS NEGOTIATED AND VOTED ON BY THE MEMBERSHIP; ALL RETIRED MEMBERS OF THE NYC POLICE PENSION FUND ARE ENTITLED TO THE VSF BENEFIT PAYMENT INCLUDING THE PLAINTIFF-APPELLANTS.

III

THE NATURE OF THE VSF BENEFIT AS PRESENTLY CONSTRUED VIOLATES FEDERAL TAX AND PENSION LAWS.

IV

TO IMPOSE COLLATERAL ESTOPPEL OR RES JUDICATA STATUS OF PLAINTIFFS WHO ARE MEMBERS OF THE NEW YORK CITY POLICE PENSION FUND BECAUSE MEMBERS OF THE NC HOUSING AND NYC TRANSIT AUTHORITY POLICE DEPARTMENTS WHO ARE MEMBERS OF THE NEW YORK CITY POLICE PENSION FUND BECAUSE MEMBERS OF THE NYC HOUSING AND NYC TRANSIT AUTHORITY POLICE DEPARTMENTS WHO ARE MEMBERS OF THE NEW

YORK CITY EMPLOYEE RETIREMENT SYSTEM BY ERRONEOUSLY DETERMINING THAT THE PLAINTIFFS ARE IN PRIVITY WITH THEM IS AN UNCONSTITUTIONAL DEPRIVATION OF THE RIGHT TO PETITION FOR REDRESS OF GRIEVANCES AND A DENIAL OF DUE PROCESS OF LAW IN THAT THE PLAINTIFFS-APPELLANTS WERE NOT PARTIES TO THOSE LITIGATIONS AND THOSE LITIGATIONS DEALT WITH PENSION SYSTEMS OF WHICH THE PLAINTIFF-APPELLANTS ARE NOT MEMBERS; PLAINTIFF-APPELLANTS WERE NOT IN PRIVITY WITH THE BALLENTINE PLAINTIFFS IN THAT THOSE PLAINTIFFS WERE HELD BY THIS COURT TO HAVE BEEN REPRESENTED BY THE POLICE BENEVOLENT ASSN. WHICH WAIVED THE CONSTITUTION; THE PLAINTIFFS-APPELLANTS WERE NOT REPRESENTED BY THAT UNION AS WAS HELD IN THE BERGAMINE CASE.

8. Pursuant to the Court of Appeals Rule 500.2(d) the undersigned hereby certifies that a notification has been forwarded tot he Attorney General in writing, on the 21st day of July, 1998, that the Plaintiffs-Appellants seek to determine the constitutional issues of:

(1) whether Ch. 247, Laws, 1988 which provided for the transfer of earnings from the NYC Police Pension Fund to the City of New York, and whether subsequent direct or indirect transfers of earnings of the NYC Police Pension Fund violated Art V, Sec. 7 of the New York Constitution. This court noted jurisdiction in the case of *Ballentine et al v. Koch,* 89 NY2d 51 (1996) wherein this court determined that the transfer was a violation f Art. V. Sec. 6 of the New York Constitution but as to the Ballentine plaintiffs, the Union had waived the constitutional proscription against the transfer of pension fund assets tot he City of New York. Also this court

noted constitutional jurisdiction In the case f *Gagliardo v. Dinkins*, 89 NY2d 62 (1996) wherein this court held that it would be unconstitutional for sequential transfers of money to take place from a pension fund to the City of New York, but that issue was not before the court at that time. This case concerns such sequential transfers.

(2) Whether the collective bargaining contract between the City of New York and its police unions excluded any retired member thereof from the payment of the Variable Supplement Fund benefit provided for in the enabling legislation Chapter 876 of the Laws of 1970 and whether the Legislature had the intent or power under Art II, Sec. 1 of the New York Constitution vesting legislative power in the legislature under separation of powers concepts and Executive power under Art. IV in the Executive branch of government, and *Executive Law* Sec. 650 making labor negotiations between the executive branch and its employees an executive branch function, and whether if in fact Ch. 876 of the Laws of 1970 did exclude any retired member of the NYC Police Pension Fund from the payment of the Variable Supplement benefit, defined by the New York Court of Appeals as deferred compensation for services the member provided while on the job, either individually or collectively render any real or imagined exclusion contained in Ch. 876 of the Laws of 1970 unconstitutional.

(30 whether not paying deferred compensation for services rendered by depriving the payment of the VSF benefit payment to the plaintiffs-appellants who are retired members of the New York City Police Department Police Pension Fund who retired either on disability or under a vested pension provision, who contributed to the Police Pension Fund as members thereof, and which VSF benefit is funded by excess earnings of Police Pension Fund investments and does not contemplate the expenditure of public funds violates the Equal Protection of the Laws component of the United States

Constitution, 14th Amendment and the New York Constitution and equal pay for equal work provisions of Federal and State law and

(4) whether as deferred compensation rather than a pension benefit, there si federal or state income tax or social security tax due or whether federal pension laws are violated.

(5) Whether litigants who are in a different union and belong to a different pension plan that the appellants here are "in privity" with them to the extent of imposing either res judicata or collateral estoppel upon the appellants as was done by the Appellate Division. It is contended hat such imposition is without due process of law. To determine that the Petitioners are bound by res judicata or collateral estoppel upon the appellants as was done by the Appellate Division. It is contended that such imposition is without due process of law. To determine that the Petitioners are bound by res judicata or collateral estoppel is an error of constitutional magnitude as the petitioners were neither parties in those actions nor in privity with the plaintiffs in those actions. With respect to the Police Union waiver of the constitution, expressed in *Ballentine v. Koch*, 89 NY2d 51 (1996), such waiver by the Union is not binding on the Petitioners because (1) the Ballentine court determined that the waiver of the constitution was binding as to the Ballentine plaintiffs, and (2) it was made abundantly clear in *Bergamine v. PBS*, 202 AD2d 201 (1st Dept. 1994) *leave to appeal denied* 83 NY2d 758 (1994) v PBA that the Union did not represent retired disable NYCPD police officers and owed them no fiduciary duty.

Because the Supreme Court and the Appellate Division decision disposed of the Appellants' claims by dismissing the complaint on summary judgment, and affirmance, those courts did appropriately address the constitutional issues involved.

(6) Because the plaintiff-appellants assert that a statute is unconstitutional, notice has been given to the Attorney

General in writing at the time of filing this jurisdictional statement and a certification of the notification is included in this statement as Ex. D. The notification was sent to the Solicitor General, Department of Law, The Capitol, Albany, New York 12224.

BY REASON WHEREOF this jurisdictional statement is being filed and the appeal taken to the Court of Appeals on constitutional grounds.

Respectfully Submitted:

S/ Ronald Podolsky
Attorney for Plaintiffs-Appellants
300 Rabro Drive
Hauppauge, New York 11788
(516) 234-3232

To:
Michael C. Hess, Corporation Counsel
Attorney for Defendants-Respondents
100 Church Street
New York, New York 10007

The Solicitor General
Department of Law, The Capitol
Albany, New York 12224

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

PETER CASTELLANO, ET AL,
Plaintiffs-Appellants,

v. Ronald Podolsky

THE CITY OF NEW YORK, ET AL., James J. Dwyer
Defendants-Respondents.

Sullivan, J.P., Milonas, Ellerin, Nardelli, Mazzarelli, JJ.

Judgment, Supreme Court, New York County (Mariln Diamond J.), entered December 30, 1996, dismissing the complaint, and bringing up for review a prior order which granted defendants' motion for summary judgment, unanimously affirmed, without costs.

The instant action is merely the latest in a long series of challenges to the validity of the Police Officers's Variable Supplements Fund and the Police Superior Officers' Variable Supplements Fund, all of which matters were previously resolved unfavorably to plaintiffs, retired New York City police officers with less than 20 years accredited service, or parties with who they were in privity (*see, Gagliardo v. Dinkins*, 89 NY2d 62; *Ballentine v. Koch*, 89 NY2d 51; *Poggi v. City of New York*, 109 AD2d 265, *affd* 67 NY2d 794; *Matter of Bergamine v. Patrolmen's Benevolent Association*, 202 AD2d 201, *lv denied* 83 NY2d 758, *Castellano v. Board of Trustees*, 937 F2d 752, *cert denied* 502 US 941; *Castellano v. City of New York*, 946 F. Supp 249, affd ___F3d___ (1998 US App Lexis 3646). "It is fundamental that a judgment in a prior

action is binding not only on the parties t that action but on those in privity with them" *(Green v. Santa Fe Indus.* 70 NY2d 244, 253), i.e., those with interests that were represented in the prior proceeding (*see, Id*), or who controlled the conduct of the prior action to further their own interests (*see, id*, at 254). It is also fundamental that once an action has been resolved, all other claims arising out of the same transaction are also barred even if based upon different theories or seeking different remedies (*see, O'Brien v. City of Syracuse*, 54 NY2d 353, 357-358). While plaintiffs could have raised additional claims in one or more of the foregoing actions, they opted not to do so, and they are barred by res judicata from doing so now. In any event, there is no merit to plaintiffs' argument that as retired police officers, they are not represented by the PBA and therefore are not bound by the PBA's waiver of Article 5, Sec. 7 of the New York State Constitution. The relevant PBA waiver is its agreement to the 1970 Legislation creating the variable supplement fund as a benefit scheme outside the purview of Article 5, Sec. 7 (*see, Ballentine v. Koch, supra*, 89 NY2d 56, 58), which took place prior to plaintiffs' retirement.[1] We have considered plaintiffs' other arguments and find them to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 23, 1998

S/

Clerk

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1. Plaintiffs; brief states that all plaintiffs retired after 1970.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

PETER CASTELLANO, ET AL,
Plaintiffs,

Index No. 9200/92
v. Motion Seq. No. 002

THE CITY OF NEW YORK, THE BOARD OF TRUSTEES OF THE POLICE OFFICER'S VARIABLE SUPPLEMENTS FUND, BOARD OF DIRECTORS OF THE POLICE SUPERIOR OFFICERS VARIABLE SUPPLEMENTS FUND,
Defendants.

MARYLIN G. DIAMOND, J.:

Plaintiffs in this action are police officers and superior officers who retired for ordinary disability, line of duty disability or prior to twenty years of service. In this declaratory judgment action, plaintiffs seek a declaration that Chapter 876 of the Laws of 1970 which established the Police Officers' Variable Supplements Fund and the Police Superior Officers' Variable Supplements Fund (both collectively referred to as the "Supplemental Funds") constitutes a pension to which plaintiffs are entitled.

Plaintiffs also seek a declaration that Chapter 247 of the Laws of 1988 authorizing transfer of $75, 000, 000 from the Supplemental Funds to the City of New York is unconstitutional in that it diminished the benefits of members of the Police Department in violation of Article v. Sec. 7 of the New York State Constitution, and impaired pre-existing rights of members of the Police Pension Fund in violation of General Construction Law Sec. 93. In that regard, plaintiffs seek an

order directing that the City refund to the Police Pension Fund or the Supplemental Funds the $75 million transferred to the City pursuant to Chapter 247.

Defendants, the City of New York, the Board of Trustees of the Police Officer's Variable Supplements Fund, and the Board of directors of the Police Superior Officers Variable Supplements Fund, cross-move for summary judgment dismissing the complaint

The Legislature created the Supplemental Funds pursuant to Chapter 876 of the Laws of 1970 as a result of collective representative, the Police Benevolent Association ("PBA") to provide supplementary payments to certain police officers and superior police officers. Funding for the Supplemental Funds was originally provided from a portion of investment earning of the New York City Police Pension Fund (*See, Poggi v. City of New York*, 109 AD2d 265 [1st Dept 1985], *affd*, 67 NY2d 794 [1986]). Payments were made at the discretion of the Trustees of the Supplemental Funds. Chapter 247 of the Laws of 1988 altered both the funding method and the payment structure. Chapter 247 also changed the benefit structure from a variable payments to a defined benefit scheme (*See,* L 1988, Ch. 247 of §§ 9, 15, 17, 18 [amending NYC Admin Code of the City of New York §§ 13-271, 13-232 and creating § 13-232.1]). In addition, section 14 of Chapter 247 authorized a one time transfer of 15% of the assets of the fund (up to $75, 000,000) to the City.

Since their creation and the change in their structure, the Supplemental Funds have been the subject of considerable litigation in both state and federal courts, including litigation b some of the plaintiffs in this case (*See, e.g., Ballentine v. Koch*, ___NY2d___, 1996 WL 604691 [1996]) (Supplemental Funds are not pension benefits and are outside of the purview of NY Constitution Article V, § 7); *Matter of Bergamine v. Patrolmen's Benevolent Association*, 202 AD2d 201 [1st Dept]

[retired police officers who are ineligible to receive payments from the Supplemental Funds do not allege a cognizable claim of breach of duty of fair representation against the police union based on the Union's failure to take steps to procure Supplemental Fund payments for them, *lv to appeal denied*, 83 NY2d 758 [1994]; *Poggi v. City of New York, supra*, 109 AD2d 265 [Supplemental Funds are not pension benefits and formula establishing the funds does not diminish or impair pension benefits in violation of Article V. §7]; *Castellano v. City of New York*, US District Ct., SDNY, June 26, 1996, Stein, J., 95 Civ 5014 [*Castellano II*] [statutory scheme establishing the Supplemental Funds does not violate the Americans with Disabilities Act. 42 USC § 12101, et seq. Or the Age Discrimination in Employment Act, 29 USC V 621 et seq.); *Castellano v. Board of Trustees of the Police Officer's Variable Supplements Fund*, 752 F. Supp. 98 [SDNY 1990], affd 937 F2d 752 [2d Cir. 1991], *cert denied* 502 US 941 [1991] [Castellano I] [statutory scheme creating supplemental payments for police officers who have retired after twenty years of service but not for those who have retired fro disability or prior to twenty years the City says nothing about who will receive payments (*See Castellano, II, supra*, 937 F2d at 757.

Even if plaintiffs did have standing, their challenges to Chapter 247 must be rejected. Plaintiffs contend that the Supplemental Funds are pension funds to which they are entitled, and that any payment to the City from those funds violates Article V. § 7 of the NY Constitution, the Pension Impairment Clause. That contention has now been unequivocally rejected by our Court of Appeals in *Ballentine v. Koch*, *supra*. In *Ballentine*, retired New York City Police Officers and Superiors Officers challenged the funding and the benefit structure of the Supplemental Funds, including the $75 million transfer to the City. In affirming the dismissal of the complaint, the Court noted that the statutory provisions

creating the Supplemental Funds clearly state that they "'shall not be, and shall not be construed to constitute, a pension or retirement system or fund'" (*Ballentine v. Koch*, *supra*, 1996 WL 603691, at *2, quoting NYC Admin Code § 13-269(b); *See also,* 13-279[b]). By defining the Supplements Funds as not a pension or retirement system, "the 1970 legislation established a benefit scheme expressly outside the purview of Article V, § 7" (*Id.* At *2).

With respect to the $75 million transfer, since plaintiffs are no eligible for payments under the Supplemental Funds and their protected pension benefits are not impaired by the transfer of excess pension fund earnings to the supplemental funds, "plaintiffs are not aggrieved by the lack standing to challenge the transfer of assets from the [Supplemental Funds] to the City of New York" *Gagliard v. Dinkins, 1996 WL 603699 at *7*).

Plaintiffs also argue that Chapter 247 violates Article VIII, § 1 of the New York State Constitution, which prohibits gifts or loans of public funds. Plaintiffs contend that if there is a shortfall in the police pension fund earning necessary to fund the Supplemental Funds pursuant to Chapter 247 the City would have to provide additional contributions to the Supplemental Funds. They argue that if the Supplemental Funds are not pensions, any additional contribution to them by the City would constitute an unconstitutional gift under Article VIII. In *Gagliardo v. Dinkins*, *supra*, decided the same day as *Ballentine v. Koch*, *supra*, the Court of Appeals rejected the Article VIII challenge to the Supplemental Funds established for retired New York City Transit Police Officers and Transit Police Superior Officers. The Transit Police Supplemental Funds, similar to the Supplemental Funds challenged in this case, were created through the collective bargaining process as future compensation for service actually rendered. The Court held that because officers who receive payments have furnished a corresponding benefit to the City of New York the payment

of supplemental benefits to eligible officers do not constitute an unconstitutional gift in violation of Article VIII (*Gagliardo v. Dinkins*, *Supra*, 1996 WL 603699 at *5). Since payments to eligible retirees do not constitute an unconstitutional gift, contributions by the City to the Supplemental Funds when there is a shortfall are constitutionally permissible.

Plaintiffs have alternatively argued that the payment of up to $75 million to the City from the Supplemental Funds impairs their pre-existing rights in violation of General Construction Law § 93. Section 93 is inapplicable given the fact that there is no repealing statute involved herein. Moreover, he only pre-existing rights which plaintiffs can claim are the rights to receive their pension payments. The payment to the City from the Supplemental Funds has not in any way interfered with plaintiffs' receipt of those payment. It has previously been held in litigation involving some of the same plaintiffs that they have no pre-existing entitlement or right to receive that particular assets held in the Supplement Funds has not in any way interfered with plaintiffs' receipt of those payments. It has previously been held in litigation involving some of the same plaintiffs that they have no pre-existing entitlement or right to receive the particular assets held in the Supplemental Funds (*See, Castellano I, supra,* 937 F2d at 758).

Accordingly, defendants' motion for Summary Judgment dismissing the complaint is granted, and it is hereby dismissed.

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted, and it is hereby dismissed and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This memorandum decision constitutes the decision and

of this court.

Dated: November 12, 1996

S/

Hon. Marylin Diamond, J.S.C.

Statutory and Constitutional Authorities

United States Constitution

First Amendment. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment. Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Constitution Article V, Sec. 7. After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

New York Executive Law, Sec. 650. Statement of Policy. The Legislature hereby reaffirjs its policy to promote haromnious and cooperative relationships between the state and its employees to protect the public by assuring, at all times, the orderly and uninterrupted operations and functins of statee government; and recognizes that furtherance of such policy requires creation in the executive departments of an office of employee relations with staff and skills requisite to act as the governor's agent in conducting collective negotiations to assure the proper implementation and administraion of agreements reached pursuant to such negotiations and to assist the governor and direct and coordinate the state's erfforts with regard to the state's powers and Duties under the public employees' fair employment act. .

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PETER CASTELLANO, ET AL,
Appellants,

v.

THE CITY OF NEW YORK, ET AL.,
Respondents.

Plaintiffs complaining of the defendants herein, and hereby seeking a declaratory judgment seeking to declare Ch. 876 of the Laws of 1970 amending the New York City Administrate Code establishing the Police Officer's Variable Supplements Fund (POVSF) and the chapter amending the New York City.
Administrative Code establishing the Superior Officers Variable Supplements Fund, as pension benefits of a retirement system, and declaring Ch. 347 of the Laws of 1988 of the State of New York as an unconstitutional violation Article V, § 7of the New York Constitution provisions relating to pension benefits, and injunctive relief pursuant to CPLR § 3001 directing the defendants to reimburse monies taken from the variable supplements funds or the Police Pension fund under the provisions of Ch. 347 of the Laws of 1988, respectfully allege.

1. At all times hereinafter mentioned the plaintiffs were and still are members of the Police Pension Fund Articles I and II.

2. At all times hereinafter mentioned the plaintiffs had attained the position of police officer, or superior officer (ranks of sergeant or above) or detective, and, as of the date hereof had retired either for ordinary disability, line of duty disability,

line of duty disability, or under a vested pension plan wherein one could retire after 15 years with the pension plan wherein one could retire after 15 years with the pension being vested to take effect on the 20th anniversary of entry into the Police Department service.

3. The defendant City of New York is a municipal corporation existing within the State of New York' the defendant Board of Trustees of the Police Officers' Variable Supplements Fund is an entity created by the Laws of the State of New York to administer the Police Officers' Variable Supplements Fund; the defendant Superior Officers' Variable Supplements Fund is an entity created by the Laws of the State of New York to administer the Superior Officers' Variable Supplements Fund.

4. Heretofore, the New York Legislature did pass legislation creating the Police Officers' Variable Supplemental fund, and the Superior Officers' Variable Supplements fund, and the Superior Officers' Variable Supplements Fund.

5. The variable supplements fund legislation was passed in order to effect the terms of collective bargaining agreements between the various police unions and the defendant City of New York.

6. The creation of the variable supplements funds established a pension benefit for the plaintiffs as members of the Police Department of the City of New York.

7. Under the terms of the collective bargaining agreements providing for the variable supplements funds no member of Police Pension Fund Article I or II was excluded.

8. The variable supplements funds were funded by a share of the profits annually generated by the New York City Police Pension Fund.

9. As of June 30, 1988 the monies and assets of the Fund exceeded 500 million dollars.

10. As members of the Police Pension Fund, the

petitioners have an equitable interest in and to the fund itself and any assets generated thereby which are to be paid to any member irrespective of how that member retired or what rank they achieved prior to retirement.

11. The enactment of Ch. 247, §14 of the Laws of 1988 of the State of New York, which amended the New York City Administrative Code, is the basis upon which the defendants did take and wrongfully transfer an amount which upon information and belief totaled 75 million dollars from the Police Officers' Variable Supplements Fund.

12. Ch. 247, §§15, 18 an 18 of the1988 of the State of New York illegally provided a mechanism by which funds derived from or part of the Police Pension Fund, were diverted from their sole and legitimate purpose of providing pension benefits to the members either by reason of direct payment from the fund or by payment into the variable supplement fund for the purpose of providing a further pension benefit to the members of the police pension systems.

13. Under the provisions of law which established the variable supplements funds, the trustees had the discretion to determine the amount of payment of supplemental pension benefits. Chapter 247 of the Laws of 1988 illegally removed from the Trustees said discretion and deprived the Members of the Police Pension Fund, including the petitioners herein from the benefits thereof.

14. Said diversion of moneys from the Police Pension Fund, of which the petitioners are members, constituted an illegal gift to the City of New York, without any purchase from, or payment or other consideration being made to the petitioners for their interest in and to the fund as members thereof.

15. By reason of the foregoing, there has been a transfer of 75 million dollars which money was and is part of a fund to establish a pension benefit for members, including the

petitioners, of the Police Pension Fund, Art. I and II, in violation of New York Constitution, Art. 5, §7 in that it diminished or impaired the benefits in a pension or retirement system of the state or civil division thereof, and constitutes a taking of petitioners' monies without just compensation, impairs their contractual relationship in and to a police pension benefit, and constitutes a gift of the property of the members of the Police Pension Fund, Art. I and II without compensation therefor.

16. As members of the Police Pension fund, Art. I and II the plaintiffs still have a preexisting acquired right in and to any and all benefits therefrom derived including any moneys earned, transferred, or established which are used in any way to provide a benefit to the members of the Police Pension Fund.

17. Heretofore, by reason of collective bargaining agreement, the defendant City of New York did contract with its police unions to establish a pension benefit, in the form of variable supplements payments from a fund established therefor, for members of the Police Pension Fund, Arts. I and II, including plaintiffs.

18. By reason of the establishment of the variable supplements fund all members of the Police Pension Funds, Art. I and II were given an acquired in and to the variable supplements funds and the benefits provided therefrom.

19. The payments from the variable supplements funds constituted a pension benefit for members of the Police Pension Fund, Arts. I and II, which could not be diminished by reason of New York Constitution Art. V, §7.

20. *General Obligations Law,* §93 specifically directs that any statute or amendment thereto may not impair a preexisting acquired right, but that same may be enjoyed, enforced or asserted to the same extent as if the statute or amendment had not been effected.

21. By reason of the transfer of $75 million dollars to

the City of New York without payment by the City of New York, therefor, an illegal gift without compensation was conferred upon the City of New York, and the acquired right of the petitioners in and to the benefits of moneys of or generated by the Police Pension Fund or any other fund which creates a benefit for retired members of the Police Pension Fund including the various variable supplements funds, illegally impairs the preexisting rights of the members of the Police Pension Fund, Art. I and II in direct violation of §93, *General Construction Law.*

22. That plaintiffs request a declaratory judgment that the payments of the variable supplements funds constitute a pension benefits which under state law cannot exclude the plaintiffs herein.

BY REASON WHEREOF, the plaintiffs respectfully request an Order:

1. Declaring that Ch. 876 et seq which established the Police Officers' Variable Supplements Fund and the Superior Officers' Variable Supplements fund created a pension or retirement benefit or system, and that Plaintiffs are entitled thereto.

2. Judgment Declaring that Ch. 247 of the Laws of 1988 is unconstitutional in that violates New York Constitution, Art. V, §7 in that it diminishes the benefits of the members of a police pension or retirement system of a municipality of the State of New York.

3. Judgment Declaring that Ch. 247 of the Laws of 1988 is unconstitutional in that it attempt to impair the preexisting rights of the members of the Police Pension Fund, Art. I and II all in violation of *General Construction Law,* §93.

4. Directing that the defendant City of New York forthwith refund to the Police Pension Fund or to the Police Officers' Variable Supplements Fund from which it derived the sum of 75 million dollars plus interest.

5. Payment of reasonable costs and attorney fees.

6. Such other relief as the Court may seem just and proper.

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SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK

PETER CASTELLANO, et al.,

Plaintiffs,

-against-

ANSWER

THE CITY OF NEW YORK, THE BOARD OF TRUSTEES OF THE POLICE OFFICER'S VARIABLE SUPPLEMENTS FUND, BOARD OF DIRECTORS OF THE POLICE SUPERIOR OFFICERS VARIABLE SUPPLEMENTS FUND,

Index No.
9200/92

Defendants.

Defendants, by their attorney, O. PETER SHERWOOD, Corporation Counsel of the City of New York, in answer to the Complaint, respectfully:

1. Deny the allegations set forth in paragraph "1" of the complaint.

2. Deny knowledge or information sufficient to form a belief as to the truth of allegations set forth in paragraph "2" of the complaint.

3. Deny so much of paragraph "3" of the Complaint as it states that an entity known as the "Superior Officers' Variable Supplements Fund" exists and affirmatively state that such entity is known as the "Police Superior Officers' Variable

Supplement Fund."

4. Den so much of paragraph "4" of the Complaint as states that an entity known as the "Superior Officers' Variable Supplements Fund" exists and affirmatively state that such entity is known as the "Police Superior Officers' Variable Supplements Fund."

5. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "5" of the Complaint.

6. Deny the allegations set forth in paragraph "6", "7" and "8" of the Complaint.

7. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "9" of the Complaint.

8. Deny the allegations set forth in paragraphs "10", "11", "12", "13", "14", "15", "16", "17", "18", "19", "20", and "21" of the Complaint.

9. Admit that paragraph "22" of the Complaint sets forth the declaratory relief sought by Plaintiffs.

FOR A FIRST AFFIRMATIVE DEFENSE, DEFENDANTS RESPECTFULLY ALLEGE:

10. The pleading fails to state a cause of action.

FOR A SECOND AFFIRMATIVE DEFENSE DEFENDANTS RESPECTFULLY ALLEGE:

11. Plaintiffs seek a judicial declaration that they cannot be excluded from receiving payment of VSF benefits under state law. Complaint ¶ 22.

12. Plaintiffs' claim of entitlement to such benefits is based upon their allegations that the VSFs were established to effectuate the terms of a collective bargaining agreement which

did not exclude them from benefits and, therefore, all retirees of the PPF – not only service retirees – are entitled to VSF benefits. Complaint ¶¶ 5, 6, 7, 8, 17 and 18.

13. Plaintiffs are barred by res judicata and collateral estoppel from seeking a declaratory judgment that they are entitled to VSF payments based upon the fact that the collective bargaining agreement leading to the creation of the Police VSFs did not specifically exclude them from receiving VSF benefits.

14. Plaintiffs have litigated the identical issue in two prior litigations, both of which found that plaintiffs were afforded no rights to VSF benefits by the underlying collectable bargaining agreement. *Castellano, v. Board of Trustees of the Police Officers' Variable Supplements Fund,* 752 F. Supp. 98 (S.D.N.Y. 1990), *aff'd*, 937 F.2d 752 (2d Cir.), *cert. denied,* __U.S. __, 112 S.Ct. 378 (1991) ("Castellano I"); *Bergamine v. Patrolmen's Benevolent Ass'n*, Index No. 6163/92 (May 4, 1993) (Wright, J).

15. Plaintiffs are also barred by res judicata and collateral estoppel from seeking a judicial declaration of their entitlement to VSF benefits based upon their allegations that they have a property interest in either the monies generated by the investment income of the PPF or in the VSFs themselves, as these issues have also been litigated on the merits, to Plaintiffs' disfavor, in *Castellano I.*

FOR A THIRD AFFIRMATIVE DEFENSE DEFENDANTS RESPECTFULLY ALLEGE:

16. Plaintiffs additionally seek a judicial declaration that Chapter 876 of the Laws of 1970 ("Chapter 876") created a pension benefit which was impaired and/or diminished by the enactment of Chapter 247 of the Laws of 1988 ("Chapter 247"), in violation of Article V, section 7 of the New York State

Constitution.

17. Inasmuch as Plaintiffs have never received VSF benefits because such benefits may be distributed only to *service* retirees of the Police Pension Fund pursuant to both Chapter 876 and Chapter 247, and Plaintiffs are not service retirees of such Fund, they are unable to demonstrate that they have been personally injured as the result of the amendments made to Chapter 876 by Chapter 247.

18. Plaintiffs, therefore, have no standing to seek a declaratory judgment that Chapter 247 violates Article V, section 7 of the New York State Constitution.

FOR A FOURTH AFFIRMATIVE DEFENSE DEFENDANTS RESPECTFULLY ALLEGE

19. Plaintiffs, as individual union members, lack standing to assert any rights arising out of any collective bargaining agreement between Defendant City of New York and Plaintiffs' duly authorized collective bargaining representative.

FOR A FIFTH AFFIRMATIVE DEFENSE DEFENDANTS RESPECTFULLY ALLEGE

20. The claims asserted herein are barred by applicable statutes of limitations.

FOR A SIXTH AFFIRMATIVE DEFENSE DEFENDANTS RESPECTFULLY ALLEGE

21. The Board of Trustees of the Police Superior Officers' Variable Supplements Fund is not a proper party to this litigation inasmuch as Chapter 247, which is being challenged, is inapplicable to the Police Superior Officer's

Variable Supplements Fund.

FOR A SEVENTH AFFIRMATIVE DEFENSE DEFENDANTS RESPECTFULLY ALLEGE

22. General Construction Law §93 is inapplicable to the instant litigation in that it is applicable only when a statute has been repealed and Chapter 247 did not repeal Chapter 876.

23. Even if General Construction Law §93 were applicable to this action, however, Plaintiffs can not demonstrate that any of their preexisting rights have been impaired by the enactment of Chapter 247 inasmuch as they were granted no rights to VSF payments by Chapter 87(.

FOR A EIGHTH AFFIRMATIVE DEFENSE DEFENDANTS RESPECTFULLY ALLEGE

24. Defendants' actions were lawful and proper in accord with all pertinent statutes, regulations, and constitutional provisions.

WHEREFORE, Defendants pray for a judgment dismissing the Complaint in its entirety and granting Defendants such other and further relief as the Court may deem just a proper.

Dated: New York, New York
September 23, 1993

Respectfully submitted,
O. PETER SHERWOOD
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City of New York
Attorney for Defendants
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By: S/_____
Susan Sanders
Assistant Corporation Counsel